

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Michael Kubayanda, Chairman;
Ann C. Fisher, Vice Chairman;
Mark Acton;
Ashley E. Poling; and
Robert G. Taub

Periodic Reporting
(UPS Proposal One)

Docket No. RM2020-9

ORDER DENYING UNITED PARCEL SERVICE, INC.'S
MOTION FOR RECONSIDERATION OF ORDER NO. 6048

(Issued January 28, 2022)

I. INTRODUCTION

On December 28, 2021, United Parcel Service, Inc. (UPS) filed a motion for reconsideration of Commission Order No. 6048.¹ The Postal Service opposes the Motion.² For the reasons discussed below, the Commission denies UPS's Motion.

¹ United Parcel Service, Inc.'s Motion for Reconsideration of Order No. 6048, December 28, 2021 (Motion).

² Opposition of the United States Postal Service to UPS Motion for Reconsideration of Order No. 6048, January 4, 2022 (Postal Service Response).

II. BACKGROUND

On May 29, 2020, UPS filed a petition pursuant to 39 C.F.R. § 3050.11 requesting the Commission to initiate a proceeding to change how the Postal Service determines incremental costs and how it accounts for peak-season costs in its periodic reports.³ UPS designated the proposed changes as UPS Proposal One. See Petition. On July 13, 2020, the Commission issued Order No. 5586 initiating a proceeding and scheduling a video technical conference to consider UPS's Petition.⁴ Following the technical conference, the Commission provided an opportunity for interested persons to file written comments.⁵ On the basis of its review of UPS's Petition, information submitted by both UPS and the Postal Service, the video technical conference, and participants' comments, the Commission issued Order No. 6048 rejecting UPS's Petition.⁶

III. UPS'S MOTION AND THE POSTAL SERVICE'S RESPONSE IN OPPOSITION

UPS bases its request for reconsideration on alleged errors of both fact and law. Motion at 2-4. In the alternative, it "requests that the Commission postpone its formal entry of Order No. 6048...until it issues an order in the appropriate share docket (Dkt. No. RM2022-2), and then reconsider Order No. 6048 in light of its decision in the appropriate share docket." *Id.* at 4.

The Postal Service opposes both the request for reconsideration of Order No. 6048 and the alternative request for postponement of the formal entry of Order No.

³ Petition of United Parcel Service, Inc. for the Initiation of Proceedings to Make Changes to Postal Service Costing Methodologies, May 29, 2020 (Petition). UPS also filed a library reference in support of its Petition. See Notice of Filing of Library Reference UPS-LR-RM2020-9/1, May 29, 2020.

⁴ Notice and Order Establishing Docket to Obtain Information Regarding Proposed Changes to Cost Methodologies and Scheduling Technical Conference, July 13, 2020 (Order No. 5586).

⁵ Notice and Order Establishing Comment Deadline, October 27, 2020 (Order No. 5738).

⁶ Order Rejecting United Parcel Service, Inc.'s Proposed Changes to Postal Service Costing Methodologies (UPS Proposal One), November 29, 2021 (Order No. 6048).

6048 pending the outcome of the appropriate share docket. Postal Service Response at 1-2.

IV. COMMISSION ANALYSIS

A. Request for Reconsideration of Order No. 6048

None of the three grounds asserted by UPS warrant reconsideration of Order No. 6048. As its first ground, UPS argues that in Order No. 6048 the Commission “erred as a matter of law in relying on a vacated order and on reasoning that the D.C. Circuit has rejected....” Motion at 3. The “vacated order” that UPS refers to is Order No. 4963, which was the subject of judicial review in *United Parcel Serv., Inc. v. Postal Regul. Comm’n*, 955 F.3d 1038 (D.C. Cir. 2020) (*UPS v. PRC*).⁷

Contrary to UPS’s assertion, however, the United States Court of Appeals for the District of Columbia Circuit in *UPS v. PRC* did not vacate Order No. 4963. Instead, it remanded the case to the Commission “for further proceedings, in accordance with the [court’s] opinion....”⁸ By remanding the case for further proceedings, the court left open the possibility that the Commission could, on remand, provide legally sufficient grounds for the conclusions it had reached in Order No. 4963.⁹ On remand, the Commission addressed the court’s concerns and questions about conclusions that the Commission

⁷ See Docket No. RM2017-1, Order Adopting Final Rules Related to the Institutional Cost Contribution Requirement for Competitive Products, January 3, 2019 (Order No. 4963).

⁸ *UPS v. PRC*, No. 19-1026, ECF Document No. 1837951, April 14, 2020, at 1.

⁹ See *UPS v. PRC*, 955 F.3d at 1051 (“On remand, the Commission might decide to revise its judgment regarding the ‘appropriate share’ under § 3633(a)(3). ... It is also possible, however, that the Commission might decide against revising its bottom-line judgment, given the other factors the Commission must consider under § 3633(b) and the latitude that the text affords the Commission in making a final determination.”). The court concluded by noting that “[i]t is not for this court to say that the Commission must account for costs in any specific way under § 3633(b) or that the Commission must make any particular ‘appropriate share’ determination under § 3633(a)(3).” *Id.*

had reached in Order No. 4963 and provided an opportunity for interested persons to comment on the Commission's supplemental analysis.¹⁰

Given the Commission's authority on remand to "decide against revising its bottom-line judgment," the court's remand without vacatur of Order No. 4963 for further Commission proceedings did not cause any references to the contents of Order No. 4963 to be legal error requiring reconsideration of Order No. 6048. *UPS v. PRC*, 955 F.3d at 1051. Moreover, UPS's references to Order No. 4963 do not disturb Order No. 6048's conclusion that UPS Proposal One failed to meet the legal requirements for changing the methodology for attributing peak-season costs, which appear in 39 U.S.C. § 3652(e)(2)(A), (C) and 39 C.F.R. § 3050.11(a). See Order No. 6048 12-13.

As its second ground for reconsideration, UPS asserts that the Commission did not adequately consider its argument that incremental costs of the Postal Service's competitive product business "should be calculated by determining *all* 'costs that could be eliminated if the Postal Service stopped delivering packages.'"¹¹ Contrary to UPS's claim, the Commission presented a specific and extensive discussion of UPS's allegations. See Order No. 6048 at 17-19. In its Motion, UPS fails to identify specifically what aspect of its claim the Commission "failed adequately to consider" and offers no facts or arguments not previously considered by the Commission. See Motion at 3.

As its third ground for reconsideration, UPS argues that the Commission "erred in accepting the Postal Service's claims that the annual December peak-season cost spike is an 'institutional cost,' and that the existing cost methodology reflects the effects of seasonal trends that influence peak-season package delivery." See *id.* at 3-4 (footnote omitted). Once again, however, UPS fails to identify the nature or source of the alleged

¹⁰ See Docket Nos. RM2017-1 and RM2022-2, Supplemental Notice of Proposed Rulemaking and Order Initiating the Third Review of the Institutional Cost Contribution Requirement for Competitive Products, November 18, 2021, at 6-7, 40-71 (Order No. 6043).

¹¹ Motion at 3 (quoting Petition at 3) (emphasis in the original).

error in the Commission's discussion of UPS's claim in Order No. 6048 and offers no facts or arguments not previously considered by the Commission. *See id.*

Finally, UPS claims that the Commission "disregarded UPS's argument showing that the peak-season cost spike has a reliably identified causal relationship with and/or is uniquely or disproportionately associated with competitive products." *Id.* at 4. Contrary to UPS's assertions, the Commission did not "disregard" UPS's argument—it discussed and rejected the argument. Order No. 6048 at 17-18. Once again, UPS's Motion merely restates UPS's earlier contentions and offers no new facts or arguments warranting reconsideration.

B. Alternative Request for Postponement and Reconsideration

In the alternative, UPS asks the Commission to "postpone its formal entry of Order No. 6048...until it issues an order in the appropriate share docket (Dkt. No. RM2022-2), and then [to] reconsider Order No. 6048 in light of its decision in the appropriate share docket." Motion at 4. None of the arguments presented by UPS provide adequate support for its request.

Order No. 6048 was issued and posted on the Commission's website on November 29, 2021. Under the Commission's rules of practice, Order No. 6048 was effective on that date. *See* 39 C.F.R. § 3010.101(d). The Commission's rules of practice do not provide for a party to request a "postponement of formal entry" or for "a delay in the final issuance" of Commission orders that have already been issued, posted, and taken effect. *See* 39 C.F.R. part 3010.

Even if a postponement or delay of the "formal entry" or "final issuance" of Order No. 6048 was permitted, UPS has failed to demonstrate that such action is appropriate or warranted. Order No. 6048 addressed a specific UPS proposal "to change how the United States Postal Service determines incremental costs, and in particular how it accounts for peak-season costs, in its periodic reports." Petition at 1. By contrast, the proceedings in Docket No. RM2022-2 deal with a different question—the question of what the appropriate share of institutional costs contributed by competitive products

should be. See Order No. 6043 at 1-2, 130; see *also* Postal Service Response at 2. Accordingly, the Commission agrees with the Postal Service that “[t]he alleged overlap between the two dockets is premised on a fundamental misconception of the nature of the scope of the two proceedings” and the exercises in the two proceedings are “conceptually distinct.” See Postal Service Response at 2.

Assuming *arguendo* UPS were correct that comments in the appropriate share proceeding in Docket No. RM2022-2 “will bear on the merits of UPS Proposal One,”¹² UPS incorrectly asserts that the issuance of Order No. 6048 “would prematurely tie the Commission’s own hands to devise a cost attribution methodology for peak-season costs that takes into account all relevant facts and arguments and comports with 39 U.S.C. § 3633(a).” *Id.* In addressing the appropriate share issue in Docket No. RM2022-2, UPS is free to advocate positions that it believes to be consistent with UPS Proposal One. If the outcome of the appropriate share proceeding supports UPS Proposal One, UPS can use conclusions reached in Docket No. RM2022-2 to file a new petition for approval of UPS Proposal One or a revised version of UPS Proposal One.

Similarly, UPS will have an opportunity to pursue the peak-season cost-attribution issues in Docket No. RM2022-1.¹³ In Order No. 6048, the Commission expressly directed the Postal Service “to accelerate studies on peak-season costs” and noted that it had recently established a proceeding in Docket No. RM2022-1 to consider possible improvements to the quality, accuracy, and completeness of Postal Service data. Order No. 6048 at 2.

Finally, UPS erroneously asserts that “a postponed final decision in the present seasonality docket [*i.e.*, Order No. 6048] will be advantageous to all parties for any appeal.” See Motion at 5. According to UPS, the alleged benefits would be the avoidance of duplicative analysis, piecemeal litigation that causes judicial inefficiency,

¹² Motion at 5.

¹³ Docket No. RM2022-1, Notice and Order of Proposed Rulemaking on Periodic Reporting, October 8, 2021 (Order No. 6004).

and the risk of inconsistent rulings that might complicate the Commission's determination of an appropriate share in Docket No. RM2022-2. *Id.*

The fundamental problem with this argument is that resolution of Docket No. RM2022-2, which concerns the method to calculate the appropriate share of institutional costs, does not directly impact the resolution of UPS Proposal One, which concerns UPS's proposed changes to the calculation of incremental costs. Thus, postponing resolution of UPS Proposal One until the conclusion of potential litigation concerning the Commission's appropriate share proceeding in Docket No. RM2022-2 does not appreciably increase judicial economy and instead would be an unnecessary delay and would inappropriately entangle distinct concepts.

C. Conclusion

For the reasons set forth above, UPS's Motion raises no cognizable issues of law or new issues of fact that warrant the relief requested.

V. ORDERING PARAGRAPH

It is ordered:

United Parcel Service, Inc.'s Motion for Reconsideration of Order No. 6048, filed December 28, 2021, is hereby denied.

By the Commission.

Erica A. Barker
Secretary